Nos. 11743-11744.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11743.

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD and WESTCHESTER FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

No. 11744.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and HARRIET ANN SCOTT,

Appellees.

APPELLANTS' REPLY BRIEF.

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tried" (p. 5); that if and when plaintiffs make a recovery, they will hold the same as trustees for appellants (p. 6); that while these propositions may not be applicable to other forms of insurance, they are applicable to fire insurance (p. 14).

The only authorities cited by appellee in support of these assertions are from jurisdictions other than California. We therefore refrain from discussing them as Section 931 of the Act unmistakably provides that the government shall be liable "under circumstances where the United States, if a private person, would be liable to the claimant for such damages * * * *in accordance with the law of the place where the act or omission occurred.* * * * The United States shall be liable in respect of such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances."

Clearer language could not be used to have expressed the unmistakable intent that if, under *California* law, a private tortfeasor would be liable to appellants, then the Government is liable; and it is a waste of time to cite *C. J. S.*[1] which refers to Louisiana cases and cases from a few other jurisdictions.

The case of *Offer v. Superior Court,* 194 Cal. 114, 228 Pac. 11, cited in appellants' opening brief (pp. 15-16) definitely establishes that in California an insurer, *upon payment of a loss,* is subrogated *pro tanto* to the insured's rights, and is thereupon entitled to sue the tortfeasor in

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[1]The same section of *C. J. S.* from which appellee cites, also cites cases from jurisdictions which hold, as California does, that an insurer which has paid all or part of a loss is entitled to bring suit in its own name against the tortfeasor.

its own name (pp. 9-10). This case has never been overruled and the rule it establishes finds support and practical application in the following California authorities dealing with various types of insurance including fire:

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 Pac. 450;

Liverpool etc. Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 58 Pac. 55;

Phoenix Ins. Co. v. Pacific Lumber Co., 1 Cal. App. 156, 81 Pac. 976;

Western Indemnity Co. v. Wasco Land etc. Co., 51 Cal. App. 672, 197 Pac. 390;

Morris v. Warner, 207 Cal. 498, 506, 279 Pac. 152;

National Auto Ins. Co. v. Cunningham, 41 Cal. App. (2d) 828, 107 P. (2d) 643;

Pacific Indemnity Co. v. Hargreaves, 36 Cal. App. (2d) 338, 98 P. (2d) 217;

Home Fire Ins. Co. v. Southwestern Engineering Corp., 114 Cal. App. 235, 299 Pac. 771.

Actually, it is common knowledge that such actions are filed by insurers in the California courts daily, and it is certainly peculiar that if the rule is as contended for by appellee that no litigant has brought the matter before an appellate court with a request that the *Offer* case be overruled.

And further proof of the unsoundness of appellee's position is found in Section 2071 of the California Insurance Code, which prescribes the California Standard Form Fire Insurance Policy. It is there set forth that

every fire policy issued in California must contain the following provision:

> "*Subrogation.* * * * This company shall, *on payment of the loss* be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom * * *."[2]

Appellee's contention amounts to this: that this action may be maintained by plaintiffs and they may recover the full amount of the loss including the amounts paid by the appellants, and then they hold such amounts or a portion thereof as trustees for appellants; but that appellants may not proceed in their own names. In other words, appellee would let the substantive rights of the parties be determined by the superficial test of who is the nominal plaintiff. If the action is brought in the insureds' name, then, says appellee, the full loss can be recovered; if brought in both names then only the uninsured loss can be recovered; and if brought in the insurer's name alone then nothing can be recovered. A more strained and unreasonable construction of the Act could hardly be imagined. Congress either intended to include or exclude claims which had been paid by insurers, but it certainly did not intend the result to be determined by the mere nominal parties to an action. To so hold would be to place form above substance, and attribute to the Act a meaning which never could have been intended.

The absurdity of this position is well pointed out by the Attorney General in ruling that the Small Tort Claims Act included subrogated claims (36 Op. Atty. Gen. 553, 557-8, cited in our opening brief):

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[2]The policies issued by appellants were on the standard form and contained this provision. [Tr. p. 18, para. II; p. 20, para. V.]

"* * * it is quite evident that the mere denial of subrogation claims presented by insurers does not meet the situation. * * * Often it will happen that a claim prosecuted by the owner of damaged property is wholly or in part for the benefit of an insurer and unless in every case the claimant is required to disclose whether he carried insurance, and the principle is applied that he will not be reimbursed by the Government to the extent that his claim is covered by collectible insurance, a discrimination would result in the treatment of those subrogation claims presented by the insured, in whole or in part, for the benefit of an insurer, as compared with claims presented directly by insurance companies.

Merely refusing claims presented by an insurer would not meet the situation. To be consistent, it is necessary to go further and read into the statute a provision that any claim presented by the owner of damaged property will be disallowed to the extent that the loss is covered by collectible insurance. * * *

* * * It thus appears that to carry out the principle contended for * * * the statute should have contained a provision that the Government shall have the benefit of any insurance carried by the claimant, and no claim shall be certified to the extent covered by collectible insurance. To read such a provision into this statute seems to me to be stretching the rule of strict construction to the breaking point."

It is submitted that the plain answer to the question is found in the Act itself—apply the simple test of whether the government would be liable to appellants under California law if it were a private individual. Since the answer to that question is in the affirmative, appellants are entitled to intervene,

II.

The Proper Construction of the Act.

Appellee insists that the Act must be construed to limit its scope to the actual person who initially sustained the injury or property damage. The weakness of its position is demonstrated not only by the plain wording of the Act, but also by appellee's admission that in order to arrive at the conclusion urged, it is necessary to read into the Act the word "his" and the words "directly or solely on account of" (p. 11). Appellants do not ask this Court to read anything into the Act; and if it is necessary to read into the Act certain absent language in order to arrive at the construction contended for by appellee, it would seem to follow that such construction is unreasonable and strained. The claim here asserted is directly and solely one for damage to property. The subrogation of appellants to plaintiffs' rights arose by operation of law and in no way changes or affects the nature of the claim, or makes it any less a "claim." To hold that it does results in emasculating the plain provision of the Act that appellee shall be liable to the *same claimants* and to the *same extent* for such property damage, *as if it were a private individual.* To reduce appellee's liability by reason of the fortuitous circumstance of insurance is to read into the Act a provision which is not there, and which is contrary to the express language used.

Appellee contends that the local law provisions of the Act only apply where "the Court has jurisdiction over the subject matter and parties." We cannot follow such reasoning. The Act specifically states that there is "jurisdiction" where the government, if a private person, would be liable under local law. So the answer to the jurisdictional question must be and can only be determined by ap-

plying the local law. If a private individual would be liable under the circumstances present to a certain person under local law for negligent injury to person or property, then the government is liable. The whole intent and purpose of the Act and the plain meaning of the language used is to cover all tort claims of "any person to whom the United States would have been liable prior to the enactment of the Act but for its sovereign immunity."[3] Appellants' position is directly in accord with this language and intent and appellees' is directly contrary thereto.

III.

The Anti-Assignment Act (31 U. S. C. A., Sec. 203).

Appellee flatly states (p. 10) that the Anti-Assignment Act (31 U. S. C., Sec. 203) is applicable to subrogated claims, but furnishes neither authority nor argument in support of its assertion. The matter is fully covered in appellants' opening brief (Points IV and V), and we wish only to add thereto a reference to a case reported since the opening brief was filed. We refer to *Coal Operators Casualty Co. v. U. S.* (U. S. D. C., E. D. Pa.), 74 F. Supp. 236 (12/29/47 issue), where the court upheld the right of a compensation carrier to assert its right of subrogation under the Suits in Admiralty Act:

> "The Suits in Admiralty Act gives general jurisdiction of the cause of action in this case. There can be no doubt that the libellant insurance carrier could maintain this libel if the ship were privately owned. In the Suits in Admiralty Act (*cit.*), the government has given its consent to be sued in cases in which a proceeding in admiralty could be maintained if the vessel were privately owned or operated."

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[3]See 21 Comp. Gen. 341, Opening Brief p. 26.

IV.
The Hill Case.

Since the filing of appellants' opening brief a case has been reported which directly holds that the Act permits the assertion of subrogated claims thereunder. The case is *Hill, et al. v. United States* (U. S. D. C., N. D. Texas), 74 F. Supp. 129 (12/22/47 issue).[4] In that case, the individual plaintiffs were riding in an automobile which collided with an Army truck, as a result of which they sustained personal injury and property damage, and the automobile in which they were riding was damaged. The insurance company plaintiff was the collision carrier on the auto and paid the cost of repairing the car. The individual plaintiffs and the insurance carrier plaintiff then joined together in filing this suit to recover for their personal injuries, property damage, and the subrogated claim of the insurance carrier plaintiff. The government moved to dismiss the subrogation claim, on the same grounds here urged, viz., that the Act "does not authorize the maintenance of suits upon derivative claims, and that such claim is prohibited under the Anti-Assignment Act." The District Court denied the motion pointing out at some length the inapplicability of the Anti-Assignment Act. The court then used the following pertinent language:

> "Another reason against the motion is rooted in the very language of the Tort Claims Act. It provides that within the bounds of the Act the Government is liable 'to the same claimants, * * * and to the same extent' as a private person under like

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[4]Both before and since the filing of appellants' opening brief we made a thorough search of the authorities and this is the only reported case we have been able to find dealing with the precise question here involved.

circumstances, according to the law of the State. * * * Under the law of Texas, if the defendant in this suit were an individual instead of the Government, the subrogation claim in question could be maintained. (cits.) * * * The government is likewise suable as to this subrogation claim. This conclusion does not raise any inconsistency with the Anti-Assignment Act, but at most only subordinates that Act to the rather plain and specific language of the later Tort Claims Act.

Some other substantiation may be pointed out from the standpoint of comparative statutes. The two principal statutes waiving the sovereign immunity of the national Government in suits on tort, contain very similar provisions in putting the Government on a parity with a private litigant. These parallel provisions of the Tort Claims Act and the Suits in Admiralty Act, Title 46 U. S. C. A. sec. 741 *et seq.*, are quoted together in the margin for ready comparison. If anything, the Tort Claims Act has the more far-reaching language. In other words, there ought to be as much liberality in the prosecution of suits under the Tort Claims Act as under the Suits In Admiralty Act. The courts have permitted the libelant to amend and claim as an assignee by the purchase of a certain vessel and the cause of action for damages thereto in the collision thereof with another vessel operated by a Government corporation, Charles Nelson Co. v. United States, D. C., 11 F. 2d 906, and in a ship owner's libel *in personam* against the Government for damages in a collision between the libelant's ship and a dredge owned by the Government, have permitted the owner of the ship's cargo to intervene. A. H. Bull S. S. Co. v. United States, D. C., 21 F. 2d 835.[5]

[5]And see cases cited under Point V, Appellants' Opening Brief.

Lastly, although the Government's motion raises primarily a question of substantive law, still it is sufficiently pertinent to mention briefly that the insurer's subrogation claim is clear of any impediment from a procedural standpoint. The provision of the Tort Claims Act governing procedure is quoted in the margin. Rule 17 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that every action shall be prosecuted 'in the name of the real party in interest,' and the insurer is such party in the prosecution of its subrogation claim. McWhirter v. Otis Elevator Co., D. C., 40 F. Supp. 11; Williams v. Powers, D. C., 2 F. R. D. 362.

The motion herein has been overruled for the several reasons stated."

Dated: Los Angeles, California, January 23, 1948.

Respectfully submitted,

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